

BROOKS, PIERCE, McLENDON, HUMPHREY & LEONARD

ATTORNEYS AT LAW

RALEIGH, NORTH CAROLINA

MAILING ADDRESS
POST OFFICE BOX 1800
RALEIGH, N.C. 27602OFFICE ADDRESS
SUITE 1600
FIRST UNION CAPITOL CENTER
150 FAYETTEVILLE STREET MALL
RALEIGH, N.C. 27601TELEPHONE 919-839-0300
FACSIMILE 919-839-0304

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C.T. LEONARD, JR. (1929-1983)
CLAUDE C. PIERCE (1913-1988)
THORNTON H. BROOKS (1912-1994)
G. NEIL DANIELS (1911-1997)GREENSBORO OFFICE
2000 RENAISSANCE PLAZA
230 NORTH ELM STREET
GREENSBORO, N.C. 27401WASHINGTON OFFICE
501 PENNSYLVANIA AVENUE, N.W.
SUITE 800, SOUTH BUILDING
WASHINGTON, D.C. 20004L.P. McLENDON, JR.
HUBERT HUMPHREY
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

January 21, 2000

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
445 12th Street, S.W., TWB204
Washington, D.C. 20004Re: *Reply Comments of Young Broadcasting, Inc.*

Dear Ms. Salas:

Transmitted herewith, on behalf of Young Broadcasting, Inc. are an original and eleven (11) copies of *Reply Comments of Young Broadcasting, Inc.*, in the above referenced proceeding.

If any questions should arise during the course of your consideration of this matter, it is respectfully requested that you communicate with this office.

Very truly yours,

BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.Kathleen M. Thornton
Counsel to Young Broadcasting, Inc.

Enclosures

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**Before the
Federal Communications Commission
Washington, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of the Satellite Home)
Viewer Improvement Act of 1999)
)
Retransmission Consent Issues)

CS Docket No. 99-363

To: The Commission

**REPLY COMMENTS OF
YOUNG BROADCASTING, INC.**

Young Broadcasting, Inc. ("Young Broadcasting"), by its attorneys, hereby submits these reply comments in response to the Commission's *Notice of Proposed Rule Making* ("Notice"), FCC 99-406, released December 22, 1999, in the above-captioned proceeding.

Young Broadcasting is a New York based corporation that owns 12 television stations and currently is in the process of acquiring another station. These stations reach 9.3 percent of the nation's households and will reach 12 percent of the nation's households once the additional station has been acquired. Young Broadcasting supports the positions taken in the joint comments of the ABC, CBS, Fox and NBC Television Network Affiliate Associations ("Network Affiliates") and the comments of the National Association of Broadcasters ("NAB"). Thus, we adopt the arguments made in those two sets of comments and, in addition, make the following brief comments.

In its *Notice*, the Commission seeks comment on how to interpret the "good faith" negotiation requirement of Section 325(b)(3)(C)(ii).¹ Young Broadcasting urges the Commission

¹ *Notice* at ¶ 14.

not to adopt an expansive definition of this term or to implement burdensome regulations governing the retransmission consent negotiation process. Instead, the Commission should adhere to the plain, common law meaning of the term "good faith" by enacting a simple rule that merely require parties to negotiate with one another.

An administrative agency has authority to interpret statutory terms only when those terms are ambiguous.² An agency has no authority to interpret or expand upon unambiguous terms used by Congress. As the Supreme Court has stated, "[i]f the intent of Congress is clear, that is the end of the matter . . . the agency must give effect to the unambiguously expressed intent of Congress."³ The term "good faith" is not an ambiguous term requiring agency interpretation. In fact, "good faith" has a well-defined common law meaning. Parties generally have no common law obligation to negotiate in "good faith",⁴ but courts have fleshed out the meaning of a duty to negotiate in "good faith" when a statute or contract gives rise to such a duty.⁵ As Disney aptly points out in its comments, courts have defined this duty as a "state of mind denoting honesty of purpose, freedom from intention to defraud, absence of design to take unconscionable advantage of another . . ."⁶ This "state of mind" is "evidence[d] by such candor and frankness in recognizing such obligations as reflect sincerity and

² See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

³ *Id.*

⁴ See, e.g., *Liu v. Price Waterhouse LLP*, No 97 CV 3093, 1999 US Dist. Lexis 16559 at * 15 (N.D. Ill. Oct. 19, 1999).

⁵ See Comments of The Walt Disney Company ("Disney") at 9.

⁶ See Comments of Disney at 9-10 (quoting *In re Coleman*, 21 F.Supp. 923, 924 (W.D. Ky. 1936)). This definition is in accord with the Black's Law Dictionary definition set forth in the Notice. Notice at ¶ 15.

willingness to perform them.”⁷ Accordingly, the common law definition of negotiating in “good faith” is that a party is “sincere” in its “willingness” to negotiate.⁸ It is a longstanding principle of statutory interpretation that statutory terms should be given their plain and common meaning.⁹ Because “good faith” negotiation has a well-accepted common law definition, there is no need for the Commission to create a new definition in this proceeding.

Young Broadcasting opposes any attempt by the Commission to expand the definition of “good faith” beyond its common law meaning. For example, the Commission should not attempt to create a list of *per se* violations. Whether a party has honestly and sincerely attempted to negotiate a retransmission consent agreement can only be determined by examining the totality of the circumstances. In addition, a list of *per se* “good faith” violations would limit the flexibility of parties because it would require them to pre-approve their negotiating tactics by checking them against a list of proscribed activities. This would only serve to slow down and complicate the negotiation process. The result will be fewer, not more, retransmission consent agreements — the very opposite of what Congress intended when it passed the SHVIA.

Creating an expansive definition of “good faith” would only insert unwarranted regulation into the retransmission consent negotiation process. Regulation of this negotiation process is unnecessary because there has been no history of failure between MVPDs and broadcast stations to reach agreements. As several commenters pointed out, the parties in a retransmission consent

⁷ *Id.*

⁸ See Comments of Network Affiliates at 15-16; Comments of the NAB at 20-21; Comments of Disney at 9-10.

⁹ See, e.g., *Matter of Witowski*, 16 F.3d 739, 745 (7th Cir. 1994).

negotiation have every incentive to come to terms.¹⁰ Broadcasters make money by selling time to advertisers. The rates a station can charge for its time correlate to the number of viewers who watch the station. The more MVPDs that carry a station's signal, the more viewers a station will have. In other words, there is a fundamental economic incentive for stations to have their signals retransmitted. MVPDs also have repeatedly made clear that they want to retransmit local stations.¹¹ Accordingly, if left to their own devices, the parties will negotiate and more likely than not, will reach an agreement. This conclusion is evidenced by the fact that numerous retransmission consent agreements are already in existence. For example, since the passage of the SHVIA, DirecTV announced that it had reached agreement with three of the four major networks to retransmit the signal of their owned stations.¹² Obviously, the free market is working. The creation of elaborate substantive rules regulating this process, such as a list of *per se* "good faith" violations, is demonstrably unnecessary.

Rules to implement the "good faith" requirement set forth in Section 325(b)(3)(C)(ii) should simply prohibit refusals to deal. Not only would an expansive, substantive regulatory scheme be at odds with the plain meaning of the statute and impair, rather than facilitate, the negotiating process, but the filing of thousands of MVPD complaints with the Commission, which substantive rules would invite, would paralyze the Commission's procedures.

¹⁰ See, e.g., Comments of Disney at 16; Comments of NAB at 12.

¹¹ See Comments of EchoStar Satellite Corporation ("EchoStar") at 1-8; Comments of DirecTV, Inc. ("DirecTV") at 1-2.

¹² See *DirecTV Reaches Agreement with NBC for Retransmission of Network-Owned Stations* (visited Jan. 21, 2000) <<http://www.directv.com/press/pressdel/0,1112,252,00.html>>.

Conclusion

Young Broadcasting respectfully urges the Commission not to burden neither the negotiation process nor the Commission's administrative procedure with substantive rules governing "good faith" negotiations. Rather, the Commission should look to the plain meaning of the term and enact a rule that requires parties to meet at reasonable times and places and to confer on the terms of an agreement. Such a standard would require all parties to genuinely attempt to reach an agreement but would not involve the Commission in setting the terms and conditions of retransmission consent as Congress explicitly provided.

Respectfully submitted,

By Kathleen M. Thornton
Kathleen M. Thornton

BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.
1600 First Union Capitol Center (27601)
Post Office Box 1800
Raleigh, North Carolina 27602
Telephone: (919) 839-0300
Counsel for Young Broadcasting, Inc.